No. [redacted]6

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1950

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF THE INLAND WATERWAYS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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We believe that the decision below is correct. However, because that decision is in conflict with decisions of the Court of Claims and because the questions presented by the petition for a writ of certiorari are posed in a great number of pending cases involving large sums of money, review by this Court appears to be warranted.

There are 34 cases under the Lucas Act (Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. 106

Note), involving about $5,500,500, now pending in the district courts. There are 55 cases, involving over $11,000,000, pending in the Court of Claims. In well over half of these cases, an issue is presented as to whether the claimant filed the written request for relief from losses by August 14, 1945, which is required by Section 3 of the Lucas Act. About one-third of the cases raise the question whether final action with respect to such a request for relief, or a release of claims, before August 14, 1945, precludes relief under the Lucas Act. The cases raising these latter problems bring into issue the validity of pars. 204 and 307 of Executive Order 9786, and, apart from this Order, the availability of "equitable" Lucas Act relief to a claimant who has entered into a mutual compromise and release. The foregoing questions have produced a number of conflicting decisions in the federal courts.

1. In this case, both lower courts have held that the request for relief from losses, required by the Lucas Act to have been filed before August 14, 1945, must have been a request for the kind of modification without consideration made available by Section 201 of the First War Powers Act (Act of December 18, 1941, 55 Stat. 839, 50 U. S. C. App. 611). The requirement is not met, this decision holds, by invoices seeking payment for contract extras or by a claim for requisitioned property—either of which would have been enforceable in an

ordinary action without benefit of the First War Powers Act. To the same effect are the decisions in *Jardine Mining Co.* v. *R. F. C.*, D. D. C., Civil No. 2843-47, May 25, 1948 (unreported); *Davidson* v. *United States*, 82 F. Supp. 420 (D. D. C.); *Acme Fur Dressing Co.* v. *United States*, 80 F. Supp. 927 (E. D. N. Y.); *F. G. Vogt & Sons* v. *United States*, 79 F. Supp. 929 (E. D. Pa.).

The Court of Claims, however, has taken a contrary position, finding sufficient requests for relief in letters requesting redeterminations under contract escalator clauses; in invoices claiming reimbursement for additional expenses; and in an appeal from a contracting officer's termination ruling. *Howard Industries, Inc.* v. *United States*, 113 C. Cls. 231; *Modern Engineering Co.* v. *United States*, 113 C. Cls. 272; *Milwaukee Engineering & Shipbuilding Co.* v. *United States*, 113 C. Cls. 276. *Accord: Stephens-Brown* v. *United States*, 81 F. Supp. 969 (W. D. Mo.). These decisions—in our view erroneous—have been rendered on Government motions to dismiss. Unreviewable at this time, these denials of motions to dismiss necessitate the lengthy and expensive proofs attending the litigation of matters relating to elaborate contracts and the losses claimed to have been incurred thereunder. A decision by this Court in the instant case might obviate this necessity. It would, at the very least, settle an issue now contested in many of the federal courts.

2. Even if it were held that petitioner meets the requirement of having filed a written request for relief, the decision below could be sustained, we believe, on the alternative grounds that final action was taken on petitioner's claim before August 14, 1945, and that petitioner entered into a mutual compromise and release of its contract claims. Although the court below decided only the question of the adequacy of the request for relief, the district court also sustained the alternative arguments urged by the Government. *Accord: Acme Fur Dressing Co.* v. *United States, supra; Jardine Mining Co.* v. *R. F. C., supra.* But here, again, the Court of Claims has announced a contrary rule. That Court has held: (1) that pars. 204 and 307 of Executive Order 9786—denying relief, respectively, to claimants upon whose requests for relief final action was taken before August 14, 1945, or to claimants who would not have been granted relief under the First War Powers Act—are invalid; and (2) that a bilateral agreement resolving claims between the contractor and the Government is no bar to Lucas Act relief. *Howard Industries, Inc.* v. *United States, supra. Accord: Warner Constr. Co.* v. *Krug,* 80 F. Supp. 81 (D. D. C.), same case, *Warner Constr. Co.* v. *United States,* 113 C. Cls. 265; *Stephens-Brown,* v. *United States,* 81 F. Supp. 969 (W. D. Mo.). These conflicting views, like the divergence as to what constitutes an adequate "request for relief," rest ultimately upon

opposing basic assumptions regarding the nature and purpose of the Lucas Act. The fundamental question throughout is whether the Act was designed to afford relief to contractors whose claims might have been granted under the First War Powers Act but for the termination of hostilities, or whether, in the words of petitioner (Pet. 11), the Act "is a remedial bit of legislation wholly independent of the First War Powers Act * * *." Resolution of this problem would expedite or terminate a considerable portion of the suits now pending. Moreover, this Court's conclusion as to the validity of the President's Executive Order, issued pursuant to Section 1 of the Lucas Act, would dispel the uncertainty now present in administrative handling of Lucas Act claims as a result of the Court of Claims and district court decisions holding pars. 204 and 307 invalid.

For these reasons, the United States does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

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